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No. 85-2118

In the Supreme Court of the United States

OCTOBER TERM, 1986

ANTHONY PUGLISI, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

CHARLES FRIED
Solicitor General

STEPHEN S. TROTT
Assistant Attorney General

JOEL M. GERSHOWITZ
Attorney

Department of Justice
Washington, D.C. 20530
(202) 633-2217

QUESTIONS PRESENTED

1. Whether the government's application for eavesdropping orders adequately established that other investigative procedures had been tried and failed, or would either be unlikely to succeed or be too dangerous, as required by 18 U.S.C. 2518(1)(c) and (3)(c).

2. Whether the district court erred in declining to admit into evidence a post-arrest statement made by one of the petitioners.

3. Whether the government failed to prove that the seized cocaine was a "controlled substance," within the meaning of 21 U.S.C. 812(c) sched. II (a)(4).

4. Whether the district court erred in declining to admit into evidence in its entirety a post-arrest statement made by a co-defendant and, if so, whether that error was harmless.

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OPINION BELOW

The opinion of the court of appeals (Pet. App. A1-A8) is reported at 790 F.2d 240.

JURISDICTION

The judgment of the court of appeals was entered on May 8, 1986. The petition for a writ of certiorari was filed on July 7, 1986. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Western District of New York, petitioners Anthony Puglisi, Anthony Bodami, and Albert Morgan were each convicted of conspiracy to distribute cocaine, in violation of 21 U.S.C. 846, and possession of cocaine with intent to distribute it, in violation of 21 U.S.C. 841(a)(1). Petitioner Puglisi also was convicted on six counts and petitioner Bodami on three counts of using a telephone to facilitate the commission of a drug offense, in violation of 21 U.S.C. 843(b). Co-defendant Antonio Pavone and Gregorio Cordero each entered a plea of guilty to the conspiracy charge.

Petitioner Puglisi was sentenced to four years' imprisonment, to be followed by a three-year special parole term. Petitioner Bodami was sentenced to a one-year term in the Buffalo Halfway House, to be followed by five years' probation, and he was fined $10,000. Petitioner Morgan was sentenced to six months in the Buffalo Halfway House. Co-defendant Pavone was sentenced to four years' imprisonment, and co-defendant Cordero was given a three year suspended sentence, six months of which was to be served in the Buffalo Halfway House.

1. The evidence at trial established that in November 1983 the government applied for eavesdropping orders to intercept wire communications at petitioner Puglisi's residence and at his construction business. The application included a lengthy affidavit by an FBI agent involved in the investigation. The affidavit claimed "that visual surveillance had been unsuccessful, that confidential informants were unable adequately to penetrate the conspiracy and were in any event unwilling to testify, and that an undercover

officer would be unable to infiltrate the conspiracy because of the close-knit nature of the group and its strong ethnic ties" (Pet. App. A3). The district court issued two eavesdropping orders, the first on November 10, 1983, and the second on November 29, 1983. The second order supplemented the first by including authorization to wiretap a telephone at a residence to which Puglisi moved shortly after the first order was issued (Pet. 4 n.1).

Pursuant to the orders, the government intercepted three telephone conversations between petitioner Puglisi and co-defendant Pavone. These conversations indicated that Pavone's associate "Greg" would transfer a quantity of drugs to Bodami at the Sheraton East Hotel in Buffalo on December 2, 1983 (VI Tr. 103, 106, 107-110; VII Tr. 70; VIII Tr. 64, 65).[1]

On the evening of December 2, the FBI posted agents in and around the Sheraton East Hotel. The agents observed Publisi, Bodami, and a third person conversing at the pool bar (II Tr. 56-59; III Tr. 64). An agent disguised as a hotel security officer later observed co-defendant Gregorio Cordero in the hotel lobby, where the agent asked Cordero if he needed assistance. Cordero, who was carrying a cloth travel bag and a paper bag, responded that he was looking for co-defendant Pavone, and he asked directions to the pool bar (III Tr. 171-173). Cordero subsequently checked into the hotel, and he was assigned the room adjacent to the FBI command post (III Tr. 147-148). At approximately the same time, petitioner Morgan entered the pool bar and joined Puglisi and Bodami in conversation (II Tr. 71-74).

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[1] References to the trial transcript (Tr.) are taken from the brief filed by the government in the court of appeals.

Shortly before midnight, Cordero entered the pool bar and spoke briefly with Puglisi, after which Puglisi, Bodami, and Morgan left the bar for the hotel lobby, where Cordero rejoined them (II Tr. 71-74). Morgan and Cordero then went to Cordero's room. A few minutes later, Morgan left the room carrying a brown paper bag (*id.* at 150-151) and rejoined Puglisi and Bodami in the lobby bar (III Tr. 176-177). FBI agents subsequently arrested Morgan, Puglisi, Bodami, and Cordero. The paper bag seized from Morgan contained a quantity of cocaine (IV Tr. 7-14), and the agents found $20,000 in $100 bills on Puglisi's person (V Tr. 22). The folowing day, FBI agents arrested co-defendant Pavone at his apartment.

2. Prior to trial, petitioners moved to suppress the evidence obtained from the wiretaps on the ground that the eavesdropping orders had been obtained in violation of 18 U.S.C. 2518(1)(c) and (3)(c). Petitioners argued that the application for the orders was deficient because it did not reflect "that other, normal 'investigative procedures ha[d] been tried and ha[d] failed or reasonably appear[ed] to be unlikely to succeed if tried or to be too dangerous'" (Pet. App. A3, quoting 28 U.S.C. 2518(3)(c)). The district court denied the suppression motion on the ground that other procedures "either were tried and shown to be unfruitful or were impractical" (Pet. App. A3).

3. On review, the court of appeals affirmed the convictions in a brief opinion (Pet. App. A1-A8). The court upheld the district court's ruling on the wiretap claim, and it rejected the several claims of trial error that petitioners raised.

ARGUMENT

1. Petitioners contend (Pet. 2-10) that the intercepted telephone conversations should have been suppressed because the application for the eavesdropping orders did not adequately demonstrate that "other investigative procedures [had] been tried and [had] failed or reasonably appear[ed] to be unlikely to succeed if tried or to be too dangerous," as required by 18 U.S.C. 2518(1)(c) and (3)(c). Petitioners further contend (Pet. 7-10) that the court of appeals' decision on this issue conflicts with decisions of other courts of appeals. These contentions lack merit.

The court of appeals correctly ruled (Pet. App. A3-A4) that the government's application for eavesdropping orders satisfied the applicable statutory requirements. As was explained in the affidavit accompanying the government's application (*ibid.*), the FBI had tried three different investigative procedures over a substantial period of time before seeking permission to intercept wire communications. The investigators had used a pen register on the telephone at Puglisi's home and business for more than four months, they had engaged in visual surveillance for six months, and they had sought to obtain information from confidential informants over a two-year period. As further explained by the affidavit, none of these techniques had proved sufficient: the pen registers revealed only telephone numbers and not the contents of conversations; private meetings among the conspirators limited the value of physical surveillance; confidential informants were unable to infiltrate the group adequately, and they were unwilling to testify out of fear for their safety. Hence, contrary to petitioners' claim, the decision of the court of appeals upholding the eavesdropping orders

does not conflict with decisions of either the Ninth Circuit in *United States* v. *Spagnulo*, 549 F.2d 705 (1977), or in *United States* v. *Kalustian*, 529 F.2d 585 (1975), or the First Circuit in *United States* v. *DiMuro*, 540 F.2d 503 (1976), cert. denied, 429 U.S. 1038 (1977). In those cases, unlike in this case, the government's application relied on nothing more than conclusory allegations that normal techniques were generally not satisfactory in investigations of unlawful gambling operations.

The court of appeals' decision also presents no conflict with the Ninth Circuit's more recent decision in *United States* v. *Ippalito*, 774 F.2d 1482 (1985). In *Ippalito*, the court found the government's application deficient, but only after concluding that it contained false or misleading statements concerning the need for electronic surveillance. No comparable circumstance is present here.

Finally, petitioner's reliance (Pet. 8-9) on other decisions of the Second Circuit is unavailing. In none of those cases did the court of appeals rule that a government application for an eavesdropping order was deficient. And in none of those cases did the court suggest that the government must always try certain investigative techniques before applying for an eavesdropping order. Moreover, contrary to petitioners' suggestion, the wiretap statute imposes no such obligation. The statute does not require that the government actually try all conceivable techniques; it is sufficient that other techniques "reasonably appear to be unlikely to succeed if tried or to be too dangerous" (18 U.S.C. 2518(1)(c)).

For this reason, petitioners are wrong in arguing (Pet. 8) that the government's application was deficient because the government failed first to attempt

techniques such as placing beepers on the suspects' cars, placing body transmitters and recording devices on informants, and using undercover agents. In this case, the close-knit nature of petitioners' conspiracy (see Pet. App. A3) and its reliance on private, clandestine meetings diminished the utility of beepers and undercover agents. In addition, the conspirators' caution in their activities made the use of "wired" informants dangerous to the informants' safety and to the success of the investigation.

2. Petitioner Puglisi argues (Pet. 10-13) that the district court improperly excluded as hearsay a post-arrest statement that Puglisi made to the FBI agents who arested him and found the $20,000 on his person. Puglisi told the FBI agents that Bodami gave him the $20,000 in payment for some construction work Puglisi had done for Bodami (*id.* at 11). The court of appeals correctly ruled that such a plainly exculpatory statement of an arrestee neither bore the "circumstantial guarantees of trustworthiness" necessary for admission under Fed. R. Evid. 803(24), nor reflected Puglisi's state of mind at the time of the arrest, requiring admission under Fed. R. Evid. 803(3). The sole relevance of the statement was to establish the truth of its contents. Hence, unlike in the other Second Circuit decisions on which petitioner relies (Pet. 12-13), the "state of mind" hearsay exception does not apply.

The court of appeals was also correct in ruling that Puglisi's post-arrest statement was not admissible either as a "verbal act" or under the "doctrine of completeness" of Fed. R. Evid. 106. The "verbal act" doctrine applies only where "the utterance is an operative fact which gives rise to legal consequences" (4 J. Weinstein & M. Berger, *Weinstein's Evidence*

§ 801(c)[01], at 801-71 (1985)), and the "doctrine of completeness" applies only when a portion of a recorded statement has been introduced into evidence. No portion of Puglisi's post-arrest statement was introduced into evidence.

3. Petitioners next contend (Pet. 14-16) that there was insufficient evidence to support their convictions because the government failed to prove that the cocaine seized was L-cocaine, the cocaine isomer derived from the coca leaf. According to petitioners, L-cocaine is the only isomer that was a "controlled substance" at the time of their offenses, as defined by 21 U.S.C. 812(c) sched. II (a)(4). There was, however, ample circumstantial evidence in the record that the seized cocaine was a "controlled substance," including its physical appearance (IV Tr. 44-45), its high price (V Tr. 22), the secretive nature of its sale (VI Tr. 103-104), and Pavone's post-arrest description of it as "cocaine" (VIII Tr. 98-99). In all events, this claim presents no important legal issue warranting further review. As petitioners acknowledge (Pet. 16), Congress amended the statute in 1984 to eliminate the "isomer defense" that petitioners advance in this case. See 21 U.S.C. (Supp. II) 812(c) sched. II (a)(4); S. Rep. 98-225, 98th Cong., 2d Sess. 263 (1984). Consequently, as petitioners concede, "[a] decision by the Court in favor of [petitioners] would have limited impact" (Pet. 16).

4. Finally, petitioner Bodami claims (Pet. 16-18) that the district court should not have excluded a portion of co-defendant Pavone's post-arrest statement. In that statement, Pavone incriminated Puglisi, but he did not mention Bodami (Pet. App. A5). The district court excluded the portion of the statement re-

lating to Puglisi. The court of appeals held that the exclusion of Pavone's post-arrest statement, if error, was harmless (*id.* at A6). As the court of appeals noted (*ibid.*), there was "ample evidence that Bodami and Puglisi spent the entire evening together and the wiretap evidence reflected several calls in which Bodami and Puglisi made plans for the night in question."

Although it appears that Pavone's post-arrest statement could properly have been excluded on hearsay grounds, the court of appeals was plainly correct in concluding that any error in excluding the statement was harmless. The mere circumstance that Bodami's name was not mentioned in Pavone's post-arrest statement is of little significance in light of the strong showing that Bodami and Puglisi were working together in both the planning and the execution of the cocaine transaction. Cf. *Delaware* v. *Van Arsdall*, No. 84-1279 (Apr. 7, 1986), slip op. 11.[2]

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[2] Petitioners also fault (Pet. 17-18) the court of appeals' determination that the district court committed harmless error, if any, in not instructing the jury that a mere purchaser of drugs cannot be convicted of aiding and abetting the sale. The court of appeals correctly reasoned (Pet. App. A6) that "[t]he machinations of Puglisi and Bodami, as reflected by the wiretap evidence, combined with the fact that it was Morgan rather than they who received the drugs, amply supported the aiding and abetting conviction."

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

CHARLES FRIED
Solicitor General

STEPHEN S. TROTT
Assistant Attorney General

JOEL M. GERSHOWITZ
Attorney

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